

A CHIN CHEE KOW v. PEGUAM NEGARA MALAYSIA

HIGH COURT MALAYA, PULAU PINANG
AZMI ABDULLAH JC
[JUDICIAL REVIEW NO: PA-25-17-04-2016]
16 DECEMBER 2016

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ADMINISTRATIVE LAW: Judicial review – Application for leave – Proceedings against decision of Attorney General of Malaysia in refusing grant of consent under s. 9 of Government Proceedings Act 1956 – ‘Any person’ – Whether included members of association – Rules of Court 2012, O. 53 r. 2(4) – Whether test for leave for judicial review satisfied – Whether application frivolous

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WORDS & PHRASES: ‘Any person’ – Rules of Court 2012, O. 53 r. 2(4) – Whether limited to individuals or class of persons

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The deceased (‘testator’) executed a will, codicil and trust deed wherein the testator bequeathed four pieces of land (‘said lands’) and cash amounting to RM15,000 for the construction of a pagoda. A further amount of RM5,000 was to be invested and the income arising from such investment to be used to maintain the pagoda for the benefit of all the devotees/followers professing and conducting Buddhist religious customs of the Deity Liam Hood Tong Chor Seng Tuan (‘association’). Since the death of the testator, the initial trustees failed to carry out the building of the pagoda and the sums of money were used up. Subsequently, an order declaring the said lands to be a public charitable trust of Liam Hood Tong Chor Seng Tuan (‘charitable trust’) was handed down by the court. After 35 years of the order, there was no effort by the trustees to carry out the wishes of the testator. The association endeavoured to secure funding from third parties to build the said pagoda. However, as a pre-condition to the said promised funding, the association needed to be appointed as a trustee to provide it with the necessary legal standing to execute agreements on behalf of the said trust. The association had applied to the Attorney General of Malaysia (‘respondent’) for consent under s. 9 of the Government Proceedings Act 1956 (‘GPA’) so that an application could be made to the High Court for the association to be made trustee in addition or to replace the current trustees. The respondent had refused his consent. Aggrieved, the applicant in his capacity as the secretary of the charitable trust association sought leave to commence judicial review of the said decision under O. 53 r. 1 of the Rules of Court 2012 (‘ROC’). The respondent objected the leave application by arguing that the applicant had not obtained consent from the respondent under s. 9 of the GPA. The respondent also argued that the ‘decision of the Attorney General belongs to the Attorney General’.

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Held (allowing application):

- (1) The court found the basis of the objection to be perplexing as the leave for judicial review was against the very decision of the respondent in refusing consent. To refuse the consent and in the same breath to now

say that consent is required before a leave for judicial review is sought is misconceived and a circular argument. Further, the respondent had not filed any affidavit to oppose the application. This was unfavourable to the respondent's position. (paras 15-17)

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(2) The leave stage was not the rightful stage to have the merits of the issues to be determined and exhaustive arguments that were considered at the leave stage were merely to sieve out frivolous applications before proceeding with the substantive stage of the proceedings. (para 18)

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(3) The submission of the respondent that the decision of the Attorney General ('AG') belonged to the AG was untenable. Upon the inspection of art. 145(3) of the Federal Constitution, the absolute discretion of the respondent was only pertaining to criminal offences whereas the present case involved the discretion or authority of the respondent in a non-prosecutorial role. Hence, it should not involve an unfettered discretion. (paras 19 & 20)

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(4) The discretion exercised by the respondent should be exercised for a proper purpose and should not be exercised unreasonably and could not be free from legal restraints. The court retained the liberty to intervene in appropriate instances depending on the facts of a particular case. (para 21)

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(5) The use of phrase 'any person' under O. 53 r. 2(4) of the Rules of Court 2012 is limited not just to individuals but also to a class of persons. The members of the association are the class of persons adversely affected by the refusal of the respondent to give consent in this instance. Therefore, the test for leave for judicial review had been satisfied. The application was not frivolous and the applicant had an arguable case. (paras 23 & 32)

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Case(s) referred to:

Gouriet v. Union of Post Officer Worker [1978] AC 435 (*refd*)

Jerry WA Dusing & Anor v. Menteri Keselamatan Dalam Negeri Malaysia & Anor [2014] 9 CLJ 321 CA (*refd*)

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Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA (*refd*)

Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional (Civil Appeal No: W-01(1M)-367-09-2014) (Unreported) (*refd*)

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Legislation referred to:

Federal Constitution, art. 145(3)

Government Proceedings Act 1956, s. 9(2)

Rules of Court 2012, O. 53 rr. 1, 2(4)

Societies Act 1966, s. 7

For the applicant - Ravi Chandran; M/s SC Ravi & Assocs

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For the 1st respondent - Rosli Ahmad; SFC

Reported by Sandra Gabriel

A JUDGMENT**Azmi Abdullah JC:****Introduction**

B [1] This is an application for leave for judicial review under O. 53 r. 1 of the Rules of Court 2012. The review being sought for is against the decision of the respondent in refusing consent under s. 9 of the Government Proceedings Act 1956 (GPA), a prerequisite before any proceedings in court can be initiated for any of the matters listed under s. 9(2) of the GPA.

C [2] The applicant brings this action in his capacity as the Secretary of the Public Charitable Trust Liam Hood Thong Chor Seng Thuan. The respondent objected to the leave application but on 28 September 2016 this court allowed leave to be granted to the applicant hence this appeal.

Background Facts

D [3] Cheah Leong Kean, deceased (the testator) had executed a will and codicil dated 6 May 1941 and a trust deed dated 6 May 1941 wherein the testator had bequeathed the four pieces of land listed below and cash to the amount of RM15,000 for the construction of a pagoda on the lands and a further amount of RM5,000 to be invested and the income arising from such investments to be used to maintain the pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the Deity Liam Hood Tong Chor Seng Tuan.

[4] The lands referred to in the will of the testator are as follows:

- F** (i) Geran No. 20348 Lot 491
(ii) Geran No. 20349 Lot 492
(iii) Geran No. 5935 Lot 292
(iv) Geran No. 20273 Lot 963

G all situated in Section 1, North East District in State of Penang (hereinafter referred to as the said lands)

H [5] Since the death of the testator, the initial trustees had failed to carry out the building of the pagoda as per the terms of the trust and the sums of money had been used up completely. On 20 August 1982 an order declaring the said land to be a Public Charitable Trust was handed down by His Lordship Judicial Commissioner Mustapha bin Hussain (as His Lordship was then) and that the principles of the cy-pres doctrine be applicable.

I [6] Since that order the said lands have been vested in the names of Robert Teng Lye Hock (deceased), So Miao Song, Tai Chong, Yeow Teow Giap (deceased) and Tan Siew Joo.

[7] In the 35 years that has lapsed since the said order, there has been no effort by the trustees to carry out the wishes of the testator or by way of cypres and the said lands have been left vacant. A

[8] The said association comprises of the followers of the Buddhist faith and devotees of the said Deity. The association frequently has religious functions and prayers to the said Deity. There is currently no place of worship for the Deity and the association carries out these prayers and other religious and charitable functions at makeshift premises. B

[9] The association had endeavoured to secure funding from third parties to build the said pagoda. However, as a precondition of the said promised funding, the association needs to be appointed as a trustee, to provide it with the necessary legal standing to execute agreements on behalf of the said trust. C

[10] In view of the above the association had *vide* letters dated 20 November 2014 and 6 July 2015 applied to the Honourable Attorney General of Malaysia (the AG) for consent under s. 9 of the Government Proceedings Act 1956 so that an application can be made to the High Court for the association to be made a trustee in addition to or to replace the current trustees. D

[11] The AG *vide* a letter dated 17 February 2016 had refused to give his consent on the grounds that consent had been previously given to the current trustees on 15 March 2014. Aggrieved by the decision of the AG, the association now applies to this court for leave to commence judicial review of the said decision and for orders of *certiorari* and *mandamus* as prayed in this application. E

The Test For Leave Applications F

[12] The case of *Jerry WA Dusing & Anor v. Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2014] 9 CLJ 321 succinctly laid down the principle as follows pertaining to leave for judicial review:

This appeal was in respect of an application for leave for judicial review where the threshold was very low. It was not necessary to go into the merits of the case at the leave stage. The test was to see whether the appellants had an arguable case and that the application was not frivolous. The appellants had passed the threshold for leave to be granted. G

[13] In *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 Gopal Sri Ram J stated: H

Applications for leave under O.53 are made and they must be made through a two stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then I

- A the High Court would be justified in refusing leave *in limine*. So too will the court be entitled to refuse leave if it is the case where the subject matter of the review is one which is settled by law (either written law or common law) is non-justiciable, e.g. proceedings in Parliament.

Issues Considered

- B *Consent Under s. 9 of GPA*

[14] The respondent in this case refused to grant consent under s. 9 of the Government Proceedings Act to enable the association to be made a trustee in addition to or replace the current trustees. The judicial review being pursued initiated by this leave application is against the said refusal by the respondent to grant consent.

[15] The respondent now objects to the leave application by arguing as a preliminary objection that the applicant has not obtained consent from the respondent under s. 9 of the Government Proceedings Act. The court finds the basis of this objection to be perplexing as the leave for judicial review is against the very decision of the respondent in refusing consent.

[16] To refuse the consent and in the same breath to now say that consent is required before a leave for judicial review is sought is most definitely a misconceived and circular argument.

[17] It is very pertinent to be noted that the respondent has not filed any affidavit to oppose this leave application. This court finds this action or the lack of, is certainly most unfavourable to the respondent's position. In the case of *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* Civil Appeal No: W-01(1M)-367-09-2014, Hamid Sultan Abu Backer J elaborated as follows:

It is important to note that the AG Chambers has not filed any affidavit in reply and the submission of facts and law by the Senior Federal Counsel on the facts of the instant case ought to have been rejected by the High Court *in limine*

As I said earlier the learned Federal Counsel was submitting from the bar on matters relating to facts without an affidavit in opposition to the leave application. In consequence, the court should have treated the leave application as one without any objection and if it is satisfied that it is not frivolous or vexatious or abuse of process of court, it should have allowed the leave for Judicial Review and considered the issues raised by the Federal Counsel upon proper affidavit in opposition filed by the respondent and the case ought to have been heard on merits.

[18] This court finds that the leave stage is not the rightful stage to have the merits of the issues to be determined and exhaustive arguments are considered at the leave stage is merely to sieve out frivolous applications before proceeding with the substantive stage of the proceedings.

[19] The submission by the Senior Federal Counsel that “the decision of the AG belongs to the AG” is untenable. Upon an inspection of art. 145(3) of the Federal Constitution and produced herein:

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The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings of an offence, other than proceedings before a Syariah court, a native court or a court-martial

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[20] This court is of the considered opinion that the absolute discretion of the respondent (if at all it exists) is only pertaining to criminal offences whereas this case involves the discretion or authority of the respondent in a non-prosecutorial role hence it should not involve an unfettered discretion.

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[21] The discretion exercised by the respondent should be exercised for a proper purpose and should not be exercised unreasonably and cannot be free from legal restraint. The court retains the liberty to intervene in appropriate instances depending on the facts of a particular case.

Interest Of The Applicant

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[22] The applicant is bringing the action in his capacity as the secretary of the association. The association is a registered society under s. 7 of the Societies Act 1966. This action is brought by the association and a society must institute an action in the name of its member who is the public officer of the society. The applicant being the secretary of the association is the public officer of the association.

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[23] This court finds that the use of the phrase “any persons” under O. 53 r. 2(4) of the Rules of Court 2012 is limited not just to individuals but also to a class of persons. The members of the association are the class of persons adversely affected by the refusal of the respondent to give consent in this instance.

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[24] The affidavit in support of the application (encl. 3) which is not accorded an affidavit in reply by the respondent to counter the averments made, has disclosed sufficient grounds for the merits of the application to be heard.

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Non-Justiciable

[25] The Senior Federal Counsel submits as a preliminary objection that the decision of the Attorney General on consent under s. 9 of the Government Proceedings Act is a non-justiciable issue.

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[26] In *Halsbury Laws of Malaysia*, Vol. 3 (1) (2015 Reissue) the definition is as below:

A justiciable issue. The subject matter of every judicial review is a decision made by some person. To qualify as a subject for a judicial review the decision must have consequences which affect some person or persons other than the decision maker, although it may affect him too.

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A The courts will not accord protection to an interest not regarded as being entitled to legal recognition. Thus, they will not pronounce upon the merits of a dispute between parties on a question of professional ethics, or award a declaration as to an issue that is academic, hypothetical, premature or dead, or make any order in relation to matter excluded from their jurisdiction. The validity of an Act of Parliament may be questioned by the courts; as is the case in respect of delegated legislation.

B Under the English law, many Crown prerogative power will not be reviewed by the courts on the grounds that they are not justiciable, such as the prerogative of entering into treaties, the defence of the realm, the granting of honours, the dissolution of Parliament and the appointment of ministers. Matters of national security are non-justiciable, provided there is some evidence that national security is at stake. Similarly, the courts will not review the exercise of the Attorney General's discretion in deciding whether to bring relator proceedings.

C [27] The decision of Lord Wilberforce in the case of *Gouriet v. Union of Post Officer Worker* [1978] AC 435 at p. 477 (Tab 13) decided on the issue of a relator action is and relied upon by the Senior Federal Counsel:

D A relator action - a type of action which has existed from the earliest times-is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) bring an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public right can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.

E An appeal was made to the Year Books to controvert this universally accepted proposition. Examples can be found of cases, in early times, where subjects were allowed to assert in the courts rights of the Crown (see Year Book Series Vol. XVII, Ed II, 1314-15, Selden Society ed. W.C. Bolland). But all these cases were cases asserting, through writs of *quo warranto* or analogous writs, claims of a nature which in modern times came to be made by the prerogative writs, or cases concerned with some proprietary right of the Crown: No instance of this could be brought forward, whether in ancient or modern times.

F The plaintiff accepted that this was so but produced a number of arguments why this form of action should be departed from or modernised. The use of the Attorney-General's name was said to be fictional: the real claimant was the individual - who has to bear the costs. The introduction of the Attorney-General was a matter of practice and procedure, the subject of judicial invention: what the court have invented, the courts can change. The Attorney-General has no real part to play in these proceedings: his functions are limited to ensuring that the action is not frivolous or vexatious. It is time to discard these fictions or at least to remould the action for use in modern times.

But the Attorney-General's role has never been fictional. His position in relator actions is the same as it is in actions brought without a relator (with the sole exception that the relator is liable for costs: see *Attorney-General v. Cockermouth Local Board* (1974) L.R. 18 Eq. 172, per Jessel M.R.). He is entitled to see and approve the statement of claim and any amendment in the pleadings, he is entitled to be consulted on discovery, the suit cannot be compromised without his approval; if the relator dies, the suit does not abate. For the proposition that his only concern is to "filter out" vexatious and frivolous proceedings, there is no authority - indeed, there is no need for the Attorney-General to do what is well within the power of the court. On the contrary he has the right, and the duty, to consider the public interest generally and widely.

It was this consideration which led to the well known pronouncement of the Earl of Halsbury LC in 1902, for the suggestion was being made that the court could inquire whether, when the Attorney-General had consented to relator proceedings, the public had a material interest in the subject matter of the suit:

... the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General": see *London County Council v. Attorney-General* [1902] AC 165, per Earl of Halsbury LC at p. 169 and per Lord Macnaghten at p. 170.

Accepting as I do that the Attorney-General's discretion is absolute and non-reviewable, there was accordingly, in my judgment, no basis upon which the plaintiff should have been granted the final injunction he sought. It remains to be considered whether he should have been granted any relief or whether, as the three defendants submit, the proceedings should have been dismissed as showing no reasonable cause of action.

There is also high authority to the effect that the Attorney-General's decision whether or not to give his consent to relator proceedings in matter concerning the public is not subject to review by the courts: see *London County Council v. Attorney-General* [1902] AC 165, 168, per Lord Halsbury LC But if the court were to entertain an application for an injunction or a declaration in a matter of public interest, after the Attorney-General had refused his consent, it would be overruling his decision at least by implication, and if eventually it were to grant the application the overruling would be even plainer.

[28] This court finds this rigid reliance on the English law on this area as submitted by the Senior Federal Counsel to be ill conceived. Reference is made to the Court of Appeal case of *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* (Civil Appeal No: W-01(IM)-367-19-2014) wherein His Lordship Justice Hamid Sultan Abu Backer elaborated on the comparative analysis of English law and Malaysian law as thus:

A [16] The learned judge in that case had also dealt extensively with the concept of justiciability and came to the conclusion that on the facts the application did not merit leave to be granted. I do not propose to repeat the cases dealt in that case save to say:

B (i) The issue of justiciability takes a different stage, approach and jurisprudence when contrasted with judicial decisions relating to Parliamentary Supremacy and Constitutional Supremacy;

C (ii) The English cases subscribing to the concept of Parliamentary Supremacy by the oath of office of an English judge has given great deference to the Act of Parliament as well as to some executive decision on the grounds of non-justiciability. In England, the courts cannot strike down an Act of Parliament and at the most it can only strike down a subsidiary legislation with exception related to European Union Law and its applicability in the UK. In cases of judicial review, the English courts have provided a restrictive meaning to the concept of justiciability, for example, the House of Lords in *CCSU v. Minister for the Civil Service* [1984] 3 All ER 71 have stated:

D Generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination.

His Lordship further elaborated as thus:

F (viii) The jurisprudential approach in the Public Law field in England and Malaysia is like the distinction between an apple and orange. The English approach takes a narrow view on justiciability favouring the Act of Parliament and where possible administrative action as stated by the House of Lords *CCSU*'s case. The Malaysia position is much wider as briefly encapsulated in the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865. The jurisprudence on justiciability on policy matters where the doctrine of Constitutional Supremacy applies is well articulated by the Indian Supreme Court in the *State of Rajasthan & Ors v. Basant Nahata* AIR 2005 SC 3401, where it was stated:

H The contention raised to the effect that this Court would not interfere with the policy must conform to the provisions of the constitutional mandates. Even otherwise a policy decision can be subjected to judicial review. [See *Cellular Operators Association of India and Ors v. Union of India and Ors*. MANU/SC/1368/2002 : [2002] SUPP5SCR222 and *Clariant International Ltd. And Anr v. Securities & Exchange Board of India* MANU/SC/0694/2004 : AIR 2004 SC4236].

[29] His Lordship then went on to conclude his judgment in the case as such: A

(x) English cases cannot stand as precedent in the instant case for non-justiciability issued for reasons stated earlier. The court when confronted with a complaint of this nature is bound to hear it on merits and provide relief if it warrants so. The right to complain vests with the applicant but whether the relief will be granted is one which relates to the jurisprudence relating rule of law and the Federal Constitution. B

(xi) It must be asserted that arbitrariness in any decision making process whether by executive or judiciary is an affront to the Rule of Law and Federal Constitution. In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, on the issue of complaint relating to arbitrariness, HRH Raja Azlan Shah (CJ Malaya as HRH then was) had anchored the jurisprudence for judicial review in immutable terms by asserting that 'unfettered discretion is a contradiction in terms, and every legal power must have limits, otherwise there is dictatorship. And the courts are the only defence of the liberty of the subject against departmental aggression'. C D

(xii) Based on the jurisprudential approach taken in *Pengarah Tanah dan Galian's* case, every complaint of arbitrariness in decision-making process of public body, if on the face of record is not frivolous, vexatious or abuse of process of court, need to be granted leave to proceed with the judicial review application on merit. E

(17) For reasons stated above, I take the view the appeal must be allowed with no order as to costs. The judgment of the High Court is set aside. Leave for judicial review is granted and the application for judicial review is to be heard on its merits. F

[30] His Lordship Justice Varghese a/1 George Varugese also in his judgment in the same case had this to say:

3. On my part the court should take a flexible approach when dealing with a leave application under Order 53 r.3. If the applicant can *prima facie* satisfy that he is a person affected by a decision of a *quasi-judicial* or administrative nature or made by a public body, the simple question that the court should ask is only this - Why should leave not be granted? G

4. The premise underlying this approach is that an aggrieved person in such circumstances has a right to seek the court's supervisory powers over decision makers and ought not to be shut out summarily. In other words the courts concern should not be to exclude such a complaint at this leave stage to take a more permissible stance unless there are clear and obvious grounds to disallow the review applied for. H I

- A [31] This court concurs with the decisions made by our Court of Appeal that has distinguished our court's stance on the issue of non-justiciable and rigid reliance on this issue on English law would be misconceived.

Conclusion

- B [32] The court in this instance finds that the test for leave for judicial review in this case has been satisfied. The application is not frivolous and the applicant has an arguable case. Therefore, the threshold for leave to be granted has been satisfied and thus order for encl. 1 is granted with further case management to be pursued before the Senior Assistant Registrar.

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